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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Provision of Directory Listing	)	CC Docket No. 99-273
Information Under the	)	
Telecommunications Act of 1934,	)	
As Amended	)	

To: The Commission

REPLY COMMENTS OF TELEGATE INC.

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Summary

In its original proposal, Telegate demonstrated the important public benefits that would result from Commission action to implement presubscribed 411 Directory Assistance service. These benefits include not only the spurring of new technical, service and economic innovations, the creation of new jobs and the enhancement of competition in the DA market, but also the extension of DA services to groups of consumers heretofore prevented from accessing reliable, high-quality DA.

Predictably, the major incumbent service providers oppose Telegate's proposal. Significantly, however, none of the comments of these parties contain any meaningful refutation of the benefits which Telegate believes its proposal could bring. Furthermore, close scrutiny of the opposition comments reveals a significant amount of actual support for many of Telegate's technical and economic assertions.

Fundamentally, this proceeding is about breaking the power of an entrenched monopoly that has dominated the provision of directory assistance services to consumers for years. The resistance of the incumbents - long on rhetoric but short on evidentiary support – only highlights their primary goal of protecting themselves from the power of innovative new competition. Such resistance ultimately ignores the interests of the public, including most notably the interest of underserved communities. The Commission should not acquiesce in the incumbents' efforts to discourage competition and maintain the status quo.

TABLE of CONTENTS

Page

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In the Matter of	)	
	)	
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I. Introduction

In this proceeding, the Commission is considering how best to encourage competition in the market for directory assistance (DA) services. Telegate has proposed that the Commission implement presubscription for DA services, as it did for interexchange services almost 15 years ago, in order to give consumers choice in the provision of this increasingly important service.

Predictably, the comments in response to Telegate's *Ex Parte Presentation* reflect the division between, on the one hand, new entrants and underserved consumers, and, on the other, the entrenched monopolist providers of 411. Despite the incumbents' efforts to frighten the Commission into believing that 411 presubscription will be financially ruinous, the record of this proceeding amply demonstrates that 411 presubscription is technically and economically feasible.

It is also clear that in this market, as in others, consumers will benefit from competition and are harmed by monopoly. Increasingly, consumers understand that "there is no real competition for directory assistance. . . When they need to find a number, most people just pick up the phone and dial 411."[1] This is still true despite the fact that, in some states, the entrenched monopolists have increased their prices for DA service by more than 70 percent in the last year alone.

For these reasons, new entrants to the DA market from small companies like Telegate to large companies like WorldCom, support presubscription of 411, as do consumer groups like the National Association of the Deaf, and even small rural LECs, like Moultrie Independent Telephone Company.

Under these circumstances, the Commission must take steps to protect consumers from the ILECs' abuse of their 411 monopoly by making true DA competition possible.

II. Implementing 411 Presubscription Is Vital To Encouraging Robust Competition In The DA Market

The Commission's goal in this docket is to promote competition in the market for DA services. In determining whether to implement Telegate's proposal, the Commission must address one issue, and one issue only: Will 411 presubscription benefit consumers, spur innovation, create jobs, and sufficiently enhance competition in the DA market for

[1] *Directory Assistance Rates Going Up, Up And Away*, Citizens Utility Board Newsletter (May 2000).

the Commission to mandate its adoption as being in the public interest? The answer is a resounding "yes."

As indicated by their filings, the National Association of the Deaf and small RLECs, such as Moultrie Independent Telephone Company, support Telegate. Several press articles demonstrate the clear consumer frustration with having monopoly control over 411. Now the record demonstrates that underserved or disadvantaged consumers would strongly prefer competition in directory assistance.

Contrary to the comments opposing Telegate's proposal, robust competition does not exist in the provision of DA services. Although no *de jure* barrier to entering the DA market currently exists, the FCC has held that control of the 411 code gives ILECs a *de facto* advantage over other DA providers.[2] This is clearly evidenced by the fact that WorldCom, a leading dial-around DA provider has stated that, should 411 presubscription occur, it will take an active role in the market.[3] WorldCom's tacit admission that dial-around services are not a true alternative to 411 indicates that the DA market is not "robustly competitive." The mere fact a market is "open" to competition does not necessarily make it "competitive." Yet in spite of this, most of the ILECs that have filed comments in this docket attempt to convince the Commission that the DA market is a model of perfect competition because it is "open" and because alternate DA

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[2] *See In the Matter of Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252 at ¶¶43-44 (1999) (hereinafter "*US West National DA Order*") (noting US West will have advantageous use of the 411 code until its local markets are open to competition).

providers have "entered." However, under this rationale the local exchange market is similarly "vigorously competitive" since it too is legally "open" to competition. As the Commission is well aware, however, local exchange competition has been slow to develop because incumbents retain many of the advantages of their monopoly legacy.

As discussed below, the Commission should dismiss these claims of open competition and require 411 presubscription as a necessary prerequisite to encouraging true competition in the DA market.

A. The FCC Has Never Held That Competition Exists In The Retail DA Market

In their filings, a number of commenters, most notably GTE, claim that, because the FCC "has repeatedly found the DA marketplace to be competitive," Telegate's 411 proposal will yield no competitive benefit.[4] To support this argument, these commenters assert that the FCC's recent *UNE Remand Order*[5] stands for the proposition that the Commission has found the entire DA market to be "robustly competitive." At best, this characterization of the Commission's findings in the *Order* stretches the truth.

In the *UNE Remand Order* the Commission was asked to determine whether ILECs should be required to provide OS/DA services to other carriers on an unbundled

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[3] *See WorldCom Comments* at 1.

[4] *See GTE Comments* at 2.

[5] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, (Third Report and Order), 15 FCC Rcd 3696 (1999) (hereinafter "*UNE Remand Order*").

basis.[6] The *UNE Remand Order* said nothing about the provision of OS/DA services to subscribers. When the Commission ultimately decided against imposing such a requirement, it did so because it found that competition existed in the market for the wholesale[7] provision of DA services. The Commission did not find then, and has not found since, that similar competition exists in the retail DA market.

More fundamentally, of course, the purpose of requiring ILECs to make UNEs available is to facilitate local exchange competition, not DA competition. Thus, the Commission's decision to drop OS/DA from the list of mandatory UNEs was not based on a finding that the DA market is robustly competitive.

GTE and others, including US West, similarly misconstrue the Commission's statements in the *US West National DA Order*[8] and the *Notice of Proposed Rulemaking* in the current docket.[9] A close reading of the *National DA Order* and the *NPRM* reveals that the incumbents' claims of a robustly competitive market are false.

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6 *See UNE Remand Order*, 15 FCC Rcd 3696, at ¶ 439, n.864 (reciting scope of Notice).

7 *See UNE Remand Order*, 15 FCC Rcd 3696, at ¶ 441 (Commission noted that "the record provides significant evidence of a wholesale market in the provision of OS/DA services").

8 *See In the Matter of Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252 (1999) (hereinafter "*US West National DA Order*").

9 *See In the Matter of Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, CC Dkt. No. 99-273, Notice of Proposed Rulemaking, 14 FCC Rcd 15550 (1999) (hereinafter "*NPRM*").

In the *National DA Order*, the Commission observed that AT&T, MCI, Internet service providers, Metro One, and InfoNXX[10] all offer nonlocal DA service, and compete for business in the DA market.[11] In the *NPRM*, the Commission stated that "the provision of directory assistance has become increasingly competitive."[12] However, the Commission has never concluded that fierce competition exists across the DA market. This is particularly true when the Commission's statements regarding the state of DA competition are read in context, in their entirety.

The simple fact of the matter is that retail DA continues to be dominated by 411. That GTE and others suggest otherwise illustrates that certain ILECs are willing to use any and all tactics to maintain their control over 411 access to the DA market. This includes mischaracterizing the FCC's own statements on the status of wholesale DA competition as applying to all DA competition. Indeed, GTE and others conveniently ignore the fact that the FCC tentatively concluded, in the *NPRM* in this proceeding, that the Commission needs to encourage competition in the DA market.[13] This belies GTE's claims that the DA market is so competitive that Commission involvement is not required.

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10 It is worth mentioning that Metro One and InfoNXX are competitors in the wholesale DA market and provide primarily wireless DA.

11 *See US West National DA Order* at ¶ 33.

12 *NPRM* at ¶ 183.

13 *NPRM* at ¶ 183.

The retail DA market is not competitive, and will not be, until consumers have the ability to presubscribe to the DA provider of their choosing with equal access. As such, the Commission should not hesitate to implement Telegate's proposal.

B. The Mere Fact Consumers Can Obtain DA Information From Sources Other Than 411 Does Not Mean The Retail DA Market Is Competitive

Several commenters have attempted to claim that 411 presubscription is unnecessary in light of the fact that "a variety of DA service providers" have successfully entered the DA market.[14] These commenters cite the existence of Internet directories, as well as the existence of AT&T's "00-Info" and such services as "10-10-9000" for the proposition that the provision of DA services has become increasingly competitive.[15] However, no evidence exists, nor does any commenter offer any, to suggest the advent of Internet DA search engines and dial-around DA numbers has significantly reduced the extent to which consumers continue to rely on 411 to obtain directory assistance. To the contrary, as Attachment A indicates, according to DA market projections performed by the Skyline Marketing Group, control over the 411 code has enabled the RBOCs and GTE to control 85 percent of the DA market, and that, despite "robust competition," the RBOCs and GTE's control of this code will continue to collectively dominate nearly 80 percent of the market during the next three years. Indeed, BellSouth implicitly concedes as much when it states that WorldCom and AT&T's dial-around services required support by "multi-million dollar, multi-media advertising campaigns"[16] just to get off the ground.

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14 See *GTE Comments* at 6.

15 See *GTE Comments* at 4.

16 See *BellSouth Comments* at 7.

US West makes a similar admission when it states that it had to spend millions to advertise and educate *its own customers* in Oregon and Washington when it switched from 555-1212 to 411, both existing services.[17] This suggests the expense of entering the market with a brand new dial-around service targeted at new customers could be prohibitively expensive. This is evidenced by the fact that WorldCom's stated interest in 411 presubscription indicates that 411 is a much more cost-effective, and competitive method of providing DA. The ILECs' comments ignore serious barriers to entry by competitors and serious barriers to access by consumers.

First, even though major interexchange carriers have entered the DA market, they do not compete on an equal footing with 411. For example, AT&T's "00-Info," although heavily promoted, cannot compete for all customers because it is only available to AT&T's presubscribed customers. The use of carrier identification codes, such as 10-10-9000, is not a solution either. Often, consumers are unable to use these services because businesses block access to these numbers although they do not block access to 411.

It is also clear, as commenters in this docket have already stated, that Internet based services are not a substitute for 411. As President Clinton and Chairman Kennard have observed, the Digital Divide prevents many Americans - particularly in underserved communities - from accessing advanced services. Even if Internet directories were as current as DA listings, which they are not, they are not available to millions of Americans who lack access to a personal computer or who do not have Internet access. Based on

[17] *See US West Comments* at 11, n. 28.

this, it is not surprising that consumers feel "[t]here is not real competition for directory assistance. . . [and that] [w]hen they need to find a number, most people just pick up the phone and dial 411."[18]

It is common knowledge that "dialing 411 is . . . more widely accepted" than dialing (NPA) 555-1212, 10-10-9000, or some other number.[19] Indeed, Because 411 has thus been ingrained into consumer consciousness, the mere fact the public can now obtain DA from sources other than 411 is in no way indicative of the state of competition in the DA market. Indeed, as the major ILECs have moved into the non-local DA market, including US West who did so without prior Commission approval, they have all chosen to market access to this service by using the 411 code, rather than via dial-around. If dial-around access were truly equivalent to 411 the ILECs might have chosen a different number for non-local DA, rather than educate consumers on a per-call basis concerning the availability of "national 411."

The ILECs' argument that 411 presubscription is unnecessary could have been applied with equal logic to the long distance market 15 years ago. At that time, however, both the MFJ Court and the Commission recognized that allowing only dial-around access to new entrants in the interexchange market would forever limit competitors to a niche market. If the ILECs truly believed that dial-around access is equal to

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[18] *Directory Assistance Rates Going Up, Up And Away*, Citizens Utility Board Newsletter (May 2000).

[19] Harry Wessel, *Here's The 411 On Directory Assistance*, ORLANDO SENTINEL, 1999 WL 2801172, at 2. Dialing (NPA) 555-1212 also has an added drawback in that, in addition to having to know the NPA,

presubscription, they would undoubtedly use dial-around access in providing their own long distance services. To Telegate's knowledge, however, neither GTE, Bell Atlantic-North, nor any of the RBOCs that provide out-of-region interLATA service, has foresworn the use of presubscription for their long distance services.

Although many commenters would have the Commission believe they are engaged in mortal combat for a share of the "richly competitive" DA market, the comments fail to provide hard figures showing that new DA entrants have been able to capture a significant share of the DA market. In fact, a close review of the submissions reveals the commenters assiduously avoid any discussion of either the size of, or the share of, the DA market they or any other entity holds.

Since no evidence thus exists about the relative market share of these "vigorous competitors," the Commission should not consider, in itself, the mere fact that consumers have multiple avenues to obtain DA to be indicative of the state of competition in the DA market. Because the ILECs provide no firm economic data that shows that Internet portals and/or dial-around numbers have eroded the share of the DA market currently commanded by 411, the Commission should discount their self-serving assertions. For given the widespread consumer recognition 411 presently enjoys, until hard data is provided that shows 411's share of the DA market has significantly eroded, it is reasonable for the Commission to infer that ILEC-controlled 411 DA calls will continue

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while consumers may think they are accessing local DA, callers actually have no way of knowing what entity provides DA service since they are forced to use the service selected by the IXC.

to dominate the DA market, to the detriment of the public interest. This is particularly true in light of the fact that, in the absence of a competitive market, and much to the dissatisfaction of consumers, many ILECs have been increasing DA rates. This past fall, for example, Pacific Bell applied to the California Public Utilities Commission for a DA rate increase of up to 300%, which would have generated an additional $120 million in annual revenue. In addition, less than four months ago Ameritech announced that it was hiking local DA rates 27%, to 95 cents per call, up from 75 cents in the fall of 1999, and up from 55 cents in February 1999.[20]

On a final note, the Commission should recognize that attempts to compare Telegate's experience in Germany to the U.S. market are not relevant to address the issue of implementing 411 presubscription. Several commenters superficially argue that, because German consumers dial a distinct access code to reach their preferred DA provider, Telegate should follow the same approach in the U.S. market.[21] These commenters conveniently ignore a key fact to arrive at this conclusion: Unlike the United States, German consumers no longer have the equivalent of a "411" code because German regulators forced the monopoly carrier, Deustche Telekom, to relinquish its long-established DA access code as a pre-requisite to opening the DA market to competition. The reason this step was implemented was to level the DA playing field in Germany and to remove the unfair advantage Deustche Telekom's number would have had over new entrants into the market, much as 411 gives the ILECs a competitive advantage in the

[20] Robert Manor, *411 Calls Jump To 95; Ameritech Hikes Rates*, CHICAGO SUN-TIMES, Feb. 17, 2000, *available in* LEXIS, News library, Curnws file.

U.S. market. As a result, all DA providers, including Deustche Telekom, were required to establish a separate number for DA. This stands in stark contrast to the U.S. market where 411 use continues to dominate the market, a point even Metro One concedes by proposing a 411XX solution.[22] In its initial comments in this docket, Telegate proposed that the Commission could promote DA competition by mandating dial-around access to DA and assigning 411 to some other purpose. We now believe this approach would be unduly costly and disruptive, however, and we note that the ILECs do not appear to have endorsed this proposal.

C. ILEC Claims Of Robust Competition In The Retail DA Market Are Unsupported

Opponents of Telegate's proposal assert that the DA market is fully competitive but fail to support these claims. A number of commenters assert that ILEC DA call volumes have decreased during the past year or two and infer from this assertion that new entrants have aggressively entered the DA market.[23] This conclusion is speculative at best.

The mere fact ILEC call volume may have decreased is not necessarily evidence of competition. To the contrary. Call volumes could have decreased for any number of reasons, not the least of which could be that consumers have grown increasingly

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21 *See BellSouth Comments* at 10.

22 *Metro One Comments* at 6.

23 *See BellSouth Comments* at 8; *GTE Comments* at 7; *SBC Comments* at 2; *US West Comments* at 8-9.

frustrated with the poor quality of DA service the ILECs currently offer.[24] In addition, the fact that ILECs are in the process of increasing DA charges could also affect volumes.

There is, however, a more fundamental problem with the claim that declining 411 call volumes are evidence of competition. Until recently, 411 was used only for local DA. In contrast, the largest "competitors" to 411 – AT&T and WorldCom – have provided national DA. It is unclear how such "competition" could cause declining 411 call volumes. Yet despite this problem, and despite the fact that Telegate estimates that the RBOCs' and GTE's combined share of the DA market has held steady at approximately 85-86 percent between 1998 and 2000,[25] GTE asserts that, because Telegate has not demonstrated that "consumer demand exists for 411 presubscription," the Commission must assume the DA market is competitive.[26] Of course, consumers are not "demanding" 411 presubscription because they haven't been offered it. This does not mean, however, that consumers do not want competition in the DA market. This is evidenced by the fact that the California Public Utilities Commission received 34,000 written comments from the public in response to Pacific Bells proposed DA rate increase, many of which lamented the absence of DA competition.[27] If, however, the ILECs are

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24 *See e.g. Low Tech Designs Comments* at 11-12 (citing article noting that when the public dials either 411 or 555-1212 for information, "chances are one in four the operator can't find the number or the number they give is wrong").

25 *See* Attachment A.

26 *GTE Comments* at 2.

27 *See In the Matter of the Application of Pacific Bell (U 1001 C), a Corporation, for Authority for Pricing Flexibility and to Increase Prices of Certain Operator Services, to reduce the Number of Monthly Directory Assistance Call Allowances, and Adjust Prices for four Centrex Optional Features, Application 98-05-038,* (Pacific Bell Application), Cal. Pub. Utils. Comm'n Decision No. 99-11-051, at 6 (Nov. 18, 1999); *Office of Ratepayer Advocates Protest in response to Pacific Bell Application No. 98-05-038* at 8 (May 5, 1998) (referencing consumer statement that "competition is non-existent and there is no recourse for the individual in the marketplace save government intervention. I base my objection on the fact that

correct that alternatives to 411 are taking significant market share from the ILECs, then it is reasonable to suppose that 411 presubscription will meet even greater consumer demand when it is introduced. The National Association of the Deaf's comments provide ample support for this since they illustrate that, once informed of its potential, consumers support presubscription initiatives.[28]

III. Telegate's Proposal Is Economically & Technically Feasible

The comments confirm the reasonableness of Telegate's proposal. Although virtually all commenters opposed to 411 presubscription dispute Telegate's implementation cost estimates, none actually contends that it is not technically feasible. Indeed, US West conceded last year that presubscription is technically feasible.[30] Moreover, even the ILEC's random cost estimates, when scrutinized, show that Telegate's cost data are reasonable.

I'm disabled, with the use of only one hand, so it is difficult to manage the use of a telephone book. In addition, I am rapidly losing my eyesight so that the ability to access an information operator for a reasonable fee is a necessity").

[28] *See National Association of the Deaf Comments* at 6-7.

[29] *See GTE Comments* at 6.

[30] *See In the Matter of Petition of US West Communications, Inc., for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of US West Communications, Inc., for Forbearance; The Use of N11 Dialing Codes and Other Abbreviated Dialing Arrangements, Memorandum Opinion & Order*, 14 FCC Rcd 16276, n.103 (1999) (noting that it "may be possible to permit access to multiple directory assistance service providers by having customers pre-select their directory assistance service provider just as they do their long distance carriers").

A. Implementing 411 Presubscription Will Not Impose Undue Financial Burdens On Any Party

At the outset, we note that, when determining whether presubscription is financially viable, the Commission should recognize that Telegate's cost data is the product of a detailed analysis of the DA market. This analysis was performed by Economists Incorporated, a highly respected independent consulting firm that specializes in economic analysis of regulated industries, and the Skyline Marketing Group, an independent marketing consulting firm specializing in telecommunications and information technology. In addition, Telegate's analysis was performed based on replies received in response to requests for information. By contrast, other commenters provide little, if any, basis for their figures other than analogizing prospective 411 costs to past LNP expenses.

As discussed in the *Ex Parte Presentation*, according to our in-depth study of the market and existing telecommunications infrastructure, Telegate estimates the costs of implementing 411 presubscription to be approximately $22.8 million dollars plus $7.1 million in annual expenses. Telegate based its cost estimates on information provided by Tekelec, a leading vendor of the SCPs and other hardware needed to implement 411 presubscription.[31] These estimates are supported by WorldCom,[32] while Illuminet has proposed an even lower-cost alternative.[33]

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[31] Tekelec's clients include companies such as Global Crossing, France Telecom, and US West.

[32] *See WorldCom Comments* at 2.

The ILECs universally challenge this figure and claim Telegate's estimates are (a) too low, and (b) fail to take account of certain expenditures that presubscription will require. Interestingly, these commenters' cost estimates vary widely, perhaps because, as Bell Atlantic admits, they did not perform sufficient studies to "provide a precise cost estimate"[34] for implementing presubscription.

GTE, for example, claims that its "rough estimate" of the initial cost of implementation is $310 million, or approximately ten times Telegate's figure.[35] Despite admitting that it has little foundation for its numbers, Bell Atlantic similarly estimates that it would cost $105 million to implement presubscription within its own system.[36] As the following discussion illustrates, when they are examined closely, it is readily apparent that (a) some of the ILEC's figures actually confirm Telegate's estimates, and (b) many of the ILEC's alleged estimates fail to provide a "general breakdown of itemized costs that would provide a reasonable foundation for such estimates,"[37] as the Commission requested.

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33 *See Illuminet Comments* at 2-3.

34 Bell Atlantic Comments at 4 (noting Bell Atlantic cannot firmly estimate the costs of modifying operations support systems). See also Bell Atlantic Comments at 3 (admitting Bell Atlantic cannot accurately forecast the costs of establishing AIN databases and building facilities to connect its databases to SS7 service transfer points for 411 presubscription purposes).

35 *GTE Comments* at 10.

36 *See Bell Atlantic Comments* at 4, 9 (estimating SCP pair expenses at $10 million, operations support systems modifications at $20-$25 million, and balloting and allocation expenses at $70 million).

37 *Public Notice, Common Carrier Bureau Seeks Further Comment On Telegate's Proposal For Presubscription To "411" Directory Assistance* Services, CC Docket Nos. 99-273 and 98-67 at 3 (Apr. 27, 2000) (hereinafter "*Public Notice*").

1. Because Many ILEC's Figures Include Costs For Features That Are Not Included In Telegate's Estimates, Rather Than Simply Comparing Total Costs, The Commission Should Take Care To Break Down Individual Estimates When Determining Their Validity

In its *Ex Parte Presentation*, Telegate clearly states that its $29.9 million dollar implementation estimate does not include the cost of balloting and allocation, nor the costs of equipping local switches with AIN 0.1 software functionality. The figure also does not include "the cost of process changes in the ILEC Service Order Process ("SOP") to acquire and transmit the presubscribed DA provider to the SMS/service center."[38] Yet, despite these full and frank admissions, when assessing Telegate's figures, GTE and other commenters gloss over this fact and include balloting and allocation estimates, software estimates, and SOP estimates in their filings in an effort to give the impression that Telegate's filing is somehow misleading.

GTE, for example, includes $200 million worth of balloting and allocation costs in its estimate. It also states that it will cost $40 million to equip switches with full AIN functionality. GTE adds this $240 million into its figures in order to imply that Telegate's estimate is misleading by a factor of ten. However, in order for a true side-by-side comparison of costs to be made, this $240 million should subtracted from GTE's total estimate of $310 million. Once this is done, even accepting its figures, which we do not, GTE's estimate differs from Telegate's by only $40 million, and only by $80 million if GTE's software estimates are included. This for a growing, multi-billion dollar industry.

Of course, Telegate does not contest that certain software costs may potentially be incurred in implementing presubscription. Telegate also does not deny that balloting and allocation will also incur costs, and in fact separately calculates balloting and allocation will impose a maximum one-time cost of $1.13 per line.[39] However, because these items were not included in Telegate's infrastructure estimate, rather than simply comparing alleged total costs, the Commission should take care to break down individual estimates when determining their validity. This is particularly true with respect to the technological investment required to implement 411 presubscription on a nationwide basis.

2. Even Though They Are Unsubstantiated, On The Whole The ILECs' SCP/STP Pair Cost Estimates Are Remarkably Similar To Telegate's

As we note in our *Ex Parte Presentation*, the largest capital expense that will be incurred to establish presubscribed DA service is the procurement of seven SCP/STP pairs, specialized computers whose prices invariably decline as the cost of computing declines.[40] Based on conversations with two leading equipment manufacturers in the field, Telegate estimates these seven pairs will cost a total of $21 million.[41] Though they decry the outrageous expense of implementation, most ILECs do not appear to dispute this figure. BellSouth, for example, asserts that "411 presubscription would . . . require [it to make] additional upfront investment of several million dollars (initial estimates are

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38 *Celantano Affidavit* at 27.

39 *See Telegate Ex Parte Presentation* at 17.

40 *See Celantano Affidavit* at 26.

41 *See id.*

\$2.5 to \$3.5 million)."[42] This amount, when multiplied by seven, for each of the former RBOCs equals \$24.5 million (7 x 3.5), a sum virtually indistinguishable from Telegate's estimate. Similarly, Bell Atlantic asserts that it would incur a \$10 million charge even if it could serve its entire territory (which now includes the former Bell Atlantic territory plus the former NYNEX territory) with a single database pair.[43] This figure implies that each former BOC would incur a \$5 million expense to install the necessary SCP/STP pairs to implement presubscription. As a result, even if we accept this inflated figure, Bell Atlantic's filing thus suggests the main infrastructure costs required for Telegate's plan will cost no more than \$40 million nationwide, even including GTE.

Of course, GTE claims that, "based on the costs associated with a number of recent purchases of such equipment," deploying seven SCP/STP pairs will cost "closer to \$50 million."[44] In light of Telegate's estimates, as well as the estimates issued by both BellSouth and Bell Atlantic for this equipment, this figure is clearly excessive. This is particularly true given that GTE fails to offer any evidence documenting its "recent purchases" or demonstrating that this equipment was even remotely comparable to the SCP/STP pairs needed for presubscription. This is important because SCP configurations, database requirements, and call volumes vary widely according to their application. Consequently, care must be taken to ensure Telegate's estimates are viewed

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42 *BellSouth Comments* at 16.

43 *See Bell Atlantic Comments* at 3-4.

44 *GTE Comments* at 15-16.

in context and not aggregated with other SCP deployments.[45] Finally, GTE et. al. also fail to indicate whether their cost figures were based on purchases made via sole-source agreements, competitive bids, or negotiated contracts.

US West's SCP/STP cost claims are even more far-fetched than GTE's. US West claims that within its region alone, "the smallest of the BOCs – the Telegate proposal would require an incremental [network] investment of $20.8 million with an annual recurring maintenance expense of $1.2 million."[46] This figure is almost six times Bell South's estimate, and more than twice Bell Atlantic's estimate. Given that US West, like GTE, provides no documentation for these estimates, without which it is unfathomable how "the smallest of the BOCs" could require a greater network investment than Bell Atlantic, these claims should be dismissed out of hand.

In sum, by their own account, the BOCs, most notably BellSouth and Bell Atlantic, appear to agree with Telegate's SCP/STP cost figures.

3. The Commission Should Reject Speculative OSS Cost Estimates

In its Public Notice on Telegate's 411 proposal, the Commission requested comments that were "based upon a general breakdown of itemized costs that would provide a reasonable foundation for such estimates."[47] Thus far, the ILECs have failed to

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45 In its *Ex Parte Presentation* Telegate presented a rigorous analysis demonstrating that DA would only increase SS7 network traffic by 2 percent.

46 *US West Comments* at 15.

47 *Public Notice* at 3.

achieve this standard. As a result, the Commission should approach claims of "potential costs" with a strong dose of skepticism.

Telegate would have welcomed detailed OSS system cost projections, but the ILECs failed to provide any evidence on the subject. As noted above, Telegate's cost analysis frankly stated that it did not incorporate the cost of process changes that may be necessary in the ILEC SOP to acquire and transmit presubscribed DA provider information to the SMS/service center. This is reflective of the fact that only individual LECs are aware of the precise workings of their SOP's and, as such, cannot be readily modeled by an outsider. Because of this, Telegate would have welcomed detailed comments as to what these process changes might cost. However, since none of the commenters provided firm data regarding their SOP costs, the Commission should approach these estimates with caution.

BellSouth's filing offers an excellent example of the pseudo-analytic manner that is characteristic of the BOCs' approach to estimating SOP costs. BellSouth's filing asserts that, "BellSouth's initial cost estimates do not include resources that would be consumed in the 'non-network' implementation of Telegate's proposal. For example, additional systems development and personnel training costing potentially millions of dollars would have to be undertaken . . . ."[48] GTE similarly states that, the costs associated with changing the ILEC SOP "could potentially dwarf all other ignored costs

[48] *BellSouth Comments* at 16.

combined."[49] Finally, US West concludes that it will be forced to allocate $8 to 10 million for the design and development work needed to create and populate "a new database for customer service record management which affects the current OSS and Service Management Systems."[50] Of course, none of these companies bothers to provide any data to support these assertions.

Since no reliable data exists to verify these estimates, the only comments on this issue that were even remotely substantive were provided by Bell Atlantic, which conceded that it had "not developed the specifications for these (OSS) modifications and therefore, cannot provide a precise cost estimate." Yet, even though it admitted that 411 presubscription "will not require changes in as many OSSs" this did not prevent the firm from hazarding that OSS modifications will cost $20 - $25 million.[51]

Since none of these estimates thus provide "a general breakdown of itemized costs that would provide a reasonable foundation for such estimates," the Commission should thus give them little, if any, consideration.

4. Because 411 Presubscription Will Not Require The Same Levels Of Investment As Local Number Portability, The Commission Should Similarly Disregard Cost Estimates That Are Based On LNP

Rather than supplying data to develop realistic cost models, many commenters attempt to analogize the costs of implementing 411 presubscription to the costs of

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49 *GTE Comments* at 15.

50 *US West Comments* at 18.

implementing LNP. GTE, for example, and again without supporting evidence, states that the "Commission's experience with LNP is instructive" for purposes of estimating certain 411 presubscription costs.[52] Since "all LECs were required to modify their ordering, provisioning, and billing systems to accommodate LNP," GTE states that, "to implement 411, all LECs will be required to make similar modifications" and that doing so "could potentially run into the hundreds of millions of dollars"[53] SBC Communications similarly baldly asserts that, because industry was "forced" to develop a unique LNP trigger to implement LNP, significant costs could be incurred if 411 presubscription requires a unique 411 trigger.[54] For its part, Bell Atlantic claims that, because it cost $50 million to purchase five SCP pairs in 1997 and 1999 to implement LNP, it will cost $10 million to acquire one SCP pair for 411 use.[55]

These cost statements have no basis in economic reality. This is particularly true in light of the fact that even fellow BOC US West "questions . . . attempts to draw analogies between LNP and . . . [Telegate's] presubscription proposal."[56] Since US West's agreement that LNP bears little relation to 411 raises credibility questions regarding all of GTE and SBC's cost projections, Telegate strongly recommends the Commission strictly scrutinize all of GTE and SBC's LNP-derived cost estimates. This recommendation is confirmed by the fact the Commission's LNP cost recovery orders

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51 *Bell Atlantic Comments* at 4.
52 *GTE Comments* at 15.
53 *GTE Comments* at 15.
54 *SBC Communications Comments* at 5.
55 *Bell Atlantic Comments* at 3.
56 *US West Comments* at 17.

indicate that it is common practice for the ILECs to systematically overstate the costs needed to effect procompetitive changes in telephone operations.

The Commission's LNP orders are replete with examples illustrating that the initial cost estimates ILECs allegedly incurred and sought to recover for LNP implementation were excessive. With respect to GTE, for example, the Commission held that, "GTE sought recovery of costs incurred in modifying over 80 OSS systems. Based on its original tariff filing and the record, we conclude that a substantial number of GTE's OSS modifications did not relate to the provision of number portability service as defined in the Third Report and Order and the Cost Classification Order."[57] The Commission also found that, "GTE also included in its original filing claims for the recovery of the costs of modifications to several OSS billing systems that we similarly find were not appropriate for recovery as number portability costs."[58]

The Commission's LNP orders, however, suggest that GTE is not alone in having overstated its LNP costs and that, indeed, doing so may have been a common pattern and practice among the ILECs.[59] US West offers a case in point. In its tariff LNP filings, US

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[57] *In the Matter of Long-Term Number Portability Tariff Filings*, CC Dkt. 99-35, Memorandum Order and Opinion, 14 FCC Rcd. 11,883, ¶ 46 (Adopted July 1, 1999).

[58] *Id.* at ¶47.

[59] *See id.* at ¶ 40 (Commission noted, with respect to Ameritech, GTE, and Southwestern Bell, that "in their initial tariff filings, the incumbent LECs either misapplied the Commission's cost recovery standards or disregarded those standards altogether with respect to numerous OSS modifications"), ¶ 45 (Commission observed that even though Ameritech made substantial reductions in its OSS claims since filing its Direct Case, "still further costs appear to be unrelated to the provision of number portability"), ¶ 49 (Commission found that, like GTE, both Pacific Bell and Southwestern Bell included "in their original tariff filings, costs for modifications to OSS systems that provide repair and maintenance functions" that were not eligible to be recovered).

West sought to recover a number of network investment expenses that were allegedly related to implementing LNP. A number of these expenses were ultimately denied, however, when the Commission implicitly concluded that US West was effectively asking the public to subsidize general network upgrades that US West had failed to perform. In denying these costs the Commission thus stated that, "We are concerned that US West's costs of implementing number portability are substantially higher than those of other carriers because it may not have performed general network upgrades on an ongoing basis, and its network is, accordingly, less up-to-date than that of other LECs."[60] Because US West failed to show that the OSS changes were made for the provision of number portability, the Commission thus concluded that, "The expenditures claimed in US West's Direct Case do not appear to support its high costs for upgrading its claimed network investments."[61]

Since the Commission's experience with LNP cost estimates thus indicate that the ILECs cost estimates tend toward the high end of the spectrum. Telegate recommends the FCC refuse to accept similar estimates in this proceeding unless detailed evidence is offered to support them.

[60] *In the Matter of Long-Term Number Portability Tariff Filings*, CC Dkt. 99-35, Memorandum Order and Opinion, 14 FCC Rcd. 11,983, ¶ 19 (Adopted July 9, 1999).

5. The Effort Required To Establish And Maintain DA Databases And To Program The N11 Trigger Detection Point For 411 Should Not Be Blown Out Of Proportion

Despite admitting that they are "impossible to forecast," in its comments, Bell Atlantic implies that significant costs will be incurred implementing 411 presubscription as a result of having to "establish new AIN databases (SCPs) to contain the 411 presubscription information and to build facilities to connect those databases to its SS7 service transfer points (STPs)."[62] US West likewise implies that overwhelming costs will be incurred if LECs are required to develop N11 software to their own specifications in order to activate N11 trigger's for 411 presubscription.[63] These claims should not be blown out of proportion.

An important component of AIN is what is known as the Service Creation Environment, or SCE. The SCE allows either telco staff or third-party developers to write applications and develop new SS7 services without involving the switching equipment manufacturer. Telegate's cost projections therefore reflect and incorporate the programming costs estimates made by an experienced third-party developer to write the 411 trigger detection point and to program the SCP for DA database operations. Because Telegate's figures are thus based on current market realities, unlike the ILECs who provide no data to illustrate the factors that go into their analysis, the Commission should

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61 *Id.*

62 *Bell Atlantic Comments* at 3.

63 *US West Comments* at 14.

discount the ILECs' cost projections related to database operations and N11 programming costs.

6. Even If The Commission Accepts The BOCs' Inflated Projections, The Costs Of Implementing 411 Presubscription Are Minimal Compared To The Public Benefits Of Presubscription

As discussed above, in contrast to Telegate's $22.8 million estimate, after subtracting balloting and allocation costs, GTE estimates that it will cost LECs a total of $110 million to make the necessary capital investments to implement 411 presubscription. Though GTE attempts to make much of this alleged discrepancy between the two figures, when broken down on a per subscriber basis, even though it is nearly five time's Telegate's projection, GTE's figure amounts to a grand total of 55 cents per subscriber, or approximately 1.529 cents per subscriber per month assuming a three year recovery period.[64] While GTE may disagree, Telegate does not believe many consumers would be unduly burdened to pay fifty-five cents over a three year period in return for the attendant benefits presubscription offers.

This figure does not dramatically rise, even incorporating GTE's $200 million dollar balloting and allocation costs. Taking GTE's $310 million total estimate as a baseline, the total cost of the capital investment and balloting and allocation for 411 presubscription comes to a grand total of $1.55 per subscriber, or 4.31 cents per subscriber per month over a three year period. Again, paying 4.31 cents per month for

[64] Telegate's $22.8 million estimate breaks down to 11.4 cents per subscriber, or 0.317 cents per subscriber per month assuming a three year recovery period. *See Siwek Affidavit* at para. 26.

three years seems to be a reasonable trade-off to spur increased competition and innovation in the DA market. Of course, Telegate's *Ex Parte Presentation* did not propose imposing a consumer surcharge; it just broke down the implementation costs on a per subscriber basis.

B. 411 Presubscription Is Technically Feasible In All Markets

The record demonstrates that 411 presubscription is technically feasible. Bell Atlantic admits that the basic AIN infrastructure is in place to allow 411 presubscription.[65] BellSouth states that it has "invested substantially in SS 7 and AIN technology."[66] For these carriers, and most if not all large ILECs, 411 presubscription using Telegate's AIN solution is clearly feasible.

Moreover, the industry as a whole has made an enormous investment in AIN development and deployment. One of the main purposes of this investment is to make carriers less dependent on switch manufacturers when they deploy new, advanced services. Under these circumstances the industry has a vested interest in maximizing the return on its already massive investment in AIN.

Given this, Telegate has proposed the AIN concept as the most cost-efficient and elegant solution to implement 411 presubscription. However, Telegate recognizes that AIN is not the only solution. To the contrary. Telegate believes the specifics of

[65] *Bell Atlantic Comments* at 3 (noting that "at least as to Bell Atlantic, Telegate is correct that the basic AIN infrastructure is in place to allow 411 presubscription").

implementing 411 presubscription is rightly the domain of industry. As a result, Telegate merely recommends AIN be used for presubscription based on the fact that the industry has a vested interest in maximizing the return on its already massive investment in AIN.

The main reason Telegate supports AIN is that, even though AIN 0.1 is not universally deployed in all switching systems in the United States, the proportion of access lines served by AIN-capable switches represents a very high penetration. In fact, assuming AIN penetration levels of 95% in RBOCs, 70% by GTE, 15% by independent telcos with more than 100,000 access lines, and 100% of CLECs, as the following chart illustrates, Telegate estimates that 83% of all access lines in the nation are served by switches that are AIN-capable. As confirmation of this high level of penetration, Telegate was gratified to note that SBC Communications concedes that it currently uses AIN N11 triggers for both 311 and 911 calls.[67] Since the N11 trigger can handle all N11 codes, this confirms that AIN is likely the best method of implementing 411 presubscription.

AIN represents the most efficient method of handling 411 presubscription because dedicated trunking is not required between either the end office or the access tandem and the DA bureau. Certainly, some expenditures will be required to augment AIN features in those switches that are not at the full AIN 0.1 release level. However, if a switch has

[66] *BellSouth Comments* at 16.
[67] *See SBC Communications Comments* at 5.

been upgraded to AIN 0.1 for LNP applications, then the N11 trigger detection point feature is already in place and simply needs to be activated.

In smaller markets where AIN is not as broadly deployed, however, other technical solutions are available to achieve 411 presubscription. In some cases, these may merely be interim steps until AIN is deployed. In other cases, the need to implement 411 presubscription may prompt carriers to accelerate AIN deployment plans. In still other markets, however, alternative solutions, such as switch-based approaches and Illuminet's LIDB-based approach, may be the most attractive implementation method. [68]

Given this, it is readily apparent that, even though AIN is not universally deployed, 411 presubscription is technically feasible in all markets.

U.S. LEC Installed Access Lines, As Of Year-end 1999

Segment	No. of Companies	Access Lines (000s)	% Total
RBOCs			
Bell Atlantic	1	42,971	23%
BellSouth	1	24,477	13%
SBC Communications	1	48,545	26%
US West	1	17,009	9%
Subtotal		133,002	72%
Independent Telcos (ITCos)			
Very Large (> 5,000,000)			
GTE	1	20,061	11%
Sprint LTD	1	7,900	4%
Large (> 1,000,000)			

68 *See Illuminet Comments* at 2-3.

ALLTEL	1	2,400	1.3%
Century Tel	1	1,273	0.7%
Global Crossing (Frontier)	1	1,072	0.6%
Broadwing (Cin Bell)	1	1,034	0.6%
Citizens	1	1,000	0.5%
Subtotal	5	6,779	3.7%
Medium (> 100,000)			
TDS Telecom	1	590	0.3%
Commonwealth Tel	1	297	0.2%
Roseville Tel	1	120	0.1%
Subtotal	3	1,007	0.5%
Small (10,001-99,999)	145	3,353	1.8%
Very Small (< 10,000)	1,100	1,902	1.0%
CLECs	190	10,366	6%
Total	1,447	184,370	100%
AIN Deployment Estimates[1]		152,773	83%

Source: Company Reports, Skyline Marketing Group Estimates
Note 1: Assumes aggregate access lines of 95% of RBOCs, 70% of GTE, 15% of Independent Telcos such as Sprint, ALLTEL, Global Crossing, Broadwing, TDS Telecom, Commonwealth Tel and Roseville Tel, and 100% of CLECs.

IV. The Commission Is Empowered To Order 411 Presubscription

Although several commenters erroneously claim otherwise, the Commission is fully empowered to require 411 presubscription and will not upset the jurisdictional balance between state and federal regulators over the DA market if it adopts Telegate's proposal. The reasons for this are that: (1) The Commission has plenary authority to administer N11 codes, (2) The Commission is fully empowered to regulate the delivery of interstate telecommunications services, and (3) The Commission can require 411 presubscription without upsetting state regulations.

A. The FCC Has Plenary Authority Over The North American Numbering Plan

It is beyond dispute that the Commission has plenary authority to regulate the administration of the North American Numbering Plan (NANP) within the United States and that it has adopted rules regulating the use of N11 codes, such as 911, in the past. This is true regardless of the fact that, until the advent of "national 411," virtually all N11 calls were arguably subject to state regulation because they all constituted intra-state, intra-LATA calls. FCC numbering rules do not somehow divest the states of their authority over intrastate services.

Because N11 codes have been and continue to be regulated by the Commission through its power over NANP, there is no reason to believe the Commission does not have the power to regulate the use of 411, another N11 code. Given this, the FCC should reject the claims made by Bell Atlantic and others that the Commission "has no jurisdiction over the way the service is provided . . . ."[69]

B. The FCC Has Jurisdiction Over 411 Directory Assistance To The Extent LECs Use 411 To Provide National DA

In addition to possessing plenary authority over the NANP, the FCC also has jurisdiction to regulate the 411 code to the extent carriers employ 411 to provide interstate or national directory assistance service. No one can dispute that the FCC has broad authority to regulate the delivery of interstate telecommunications services. Thus, to the extent companies, such as Bell Atlantic, provide national 411 directory assistance, their entry into the interstate DA market automatically subjects them, and their 411 service, to oversight by the FCC. Consequently, the Commission should refuse to recognize blatantly false statements that claim the FCC, "may not require 411 presubscription any more than it could have required intraLATA presubscription before the 1996 Act."[70] It is the ILECs themselves that have made 411 an interstate service. They cannot now complain that the FCC has no jurisdiction.[71]

C. The FCC Need Not Preempt State Regulation Of Local DA To Require 411 Presubscription

Finally, in addition to possessing the authority to do so, the Commission can order 411 presubscription without "potentially plac[ing] the Commission in direct conflict with the states."[72]

Several commenters, including USTA[73] and GTE,[74] attempt to seize on the fact that, because 411 has traditionally been regulated by the states, and because ILECs are often required to meet certain performance requirements and offer consumers free local calls each month, implementation of Telegate's plan "raises thorny federal/state jurisdictional issues."[75] These commenters imply that, before it implements 411

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69 *Bell Atlantic Comments* at 2.

70 *Bell Atlantic Comments* at 2.

71 Of course, the ILECs recognize, perhaps unhappily, that the FCC has jurisdiction over national DA and have sought FCC declaratory rulings to allow them to provide the service. At least in the case of US West, however, the request only came after it had begun providing national DA.

72 *SBC Communications Comments* at 7.

73 *See USTA Comments* at 9-10.

74 *See GTE Comments* at 18-19.

75 *GTE Comments* at 18.

presubscription, the Commission must first decide "whether or not it would need to pre-empt state regulation of these issues."[76] Nothing could be further from the truth.

Concurrent state and federal regulations exist throughout the telecommunications industry. No legal reason exists to prevent 411 presubscription from being implemented while maintaining existing state 411 regulations. Indeed, Telegate recognizes and respects state 411 rules, and will fully comply with any applicable state DA requirements when it enters the market.[77] As a result, presubscription will not unduly intrude upon state jurisdiction over the DA market. Indeed, presubscription will have no effect upon the states. Thus, as the Commission's experience with issuing 911 regulations has shown, if Telegate's plan is adopted, it is clear that both the Commission and the states will be able to exercise concurrent jurisdiction over 411, without upsetting the regulatory balance that exists between the two.

VI. Claims That 411 Presubscription Raises Consumer Protection Concerns Are Speculative

As part of their scattershot opposition to open competition in the DA market, several commenters tenuously assert that 411 presubscription should not be implemented because doing so could foster consumer protection concerns such as "slamming" and "cramming."[78] GTE even goes so far as to claim that "Telegate's model removes a level

[76] *GTE Comments* at 18.

[77] Of course, both state and federal regulators regulate new entrants and competitive markets differently from incumbents and competitive markets differently from incumbents providing monopoly services. While new entrants typically are subjected to less stringent regulation than incumbents because new entrants lack market power, it is also true that incumbents' services are deregulated as full competition develops.

[78] *See BellSouth Comments* at 11, 13; GTE Comments at 19.

of affirmative control that the customer exercises when selecting a service provider."[79] These commenters are grasping straws.

In the first place, slamming in the DA market is quite unlikely. This is because DA providers typically identify themselves at the beginning of each call so consumers immediately know with which service they are dealing. In contrast, 1+ subscribers who have been slammed typically make long distance calls without knowing they are being served by a carrier other than their presubscribed carrier until they receive their phone bill. The Commission could thus effectively preclude slamming from occurring by making this kind of identification mandatory since this type of requirement would enable consumers to immediately know whether they have been slammed.

Taken to their logical conclusion, the ILECs arguments, like the same commenters' arguments against balloting and allocation, suggest that the telecom industry should return to the safe days of monopoly. Before the introduction of competition, practices such as slamming were impossible. Therefore, the ILECs argue, Commission should protect consumers by protecting the ILECs' monopoly over 411.

As noted above, however, there is little reason to expect the kinds of consumer issues the ILECs' fear. As a result, the solution to any problems that may arise is to prosecute violators, not to outlaw competition.

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[79] *GTE Comments* at 19.

[80] *See GTE Comments* at 19.

The fact that DA slamming "may potentially occur at some point in the future" is thus not a sufficient reason to reject 411 pre-subscription. After all, federal regulators did not limit the growth of commercial banks based on the possibility that crimes such as embezzlement or bank robbery might occur. Instead, the proper course of action is to arrest and prosecute violators.

VII. Telegate's Proposal Is A Logical Outgrowth Of The Current Docket And Hence May Appropriately Be Considered By The Commission

Several commenters challenge the Commission's authority to consider Telegate's proposal on the grounds that the current docket is too "narrowly focused on access to ILEC's directory listings" to address the question of 411 presubscription.[82] These commenters claim that since the "impetus for the Commission's inquiry in the Directory Listings Proceeding is the monopoly control that ILECs exert over existing directory listings," the FCC may not consider presubscription.[83]

Like the vast majority of arguments by those opposed to Telegate's market opening initiative, these commenters mischaracterize the law and, consequently, fail to support their claims with case law.

As Telegate observed in its *Ex Parte Presentation*, under the APA, the Commission may alter, change, or otherwise refine the class of issues addressed in a final

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81 *Bell Atlantic Comments* at 1.

82 *InfoNXX Comments* at 2. *See also BellSouth Comments* at 2.

rule so long as the public has adequate notice and an opportunity to comment on the issues under consideration.[84] Despite InfoNXX and BellSouth's characterizations, the current docket was never limited simply to inquiring into accessing ILEC directory listings. The *NPRM* in this docket clearly states that the Commission's objective in the current proceeding is to "encourage . . . competition in the provision of directory assistance, whether or not the particular directory assistance provider also provides telephone exchange service or telephone toll service."[85] Given this, and given that the courts have repeatedly stated that administrative agencies are entitled to deviate from their proposed rules when issuing final rules,[86] the Commission is fully empowered to consider Telegate's proposal. This is particularly true in light of the fact that the Commission issued a public notice soliciting comments on Telegate's proposal, even though it had no obligation to do so under existing precedent.[87]

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83 *InfoNXX Comments* at 3.

84 *See Telegate Ex Parte Presentation* at 20-21.

85 *NPRM*, 14 FCC Rcd at 15645.

86 *See CFTC v. Schor*, 478 U.S. 833, 845 (1986) (court held that "it goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound"); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632, n.51 (D.C. Cir. 1973) (court held that "a contrary rule [that the final rule may not modify the proposal] would lead to the absurdity that in rule-making under the APA the agency can learn from comments on the proposals only at the peril of starting a new procedural round of commentary"). *See also NRDC v. Thomas*, 838 F.2d 1224, 1243 (D.C. Cir. 1988) (even though agency adopted different system for calculating emissions than proposed in initial rule, court found proposed rule contained the "germ" of the final rule and upheld the measure); *United Steelworkers of America v. Schuykill Metal Corp.*, 828 F.2d 314, 318 (5th Cir. 1987) (court, noting that public comments expressly raised issue addressed in final rule, rejected claim that broad proposed OSHA rule did not adequately alert the public of the scope of the rulemaking and upheld the final rule) (following NPRM, agency had issued Federal Register notice of additional comment period concerning lead exposure protections); *Wilson & Co. v. United States*, 335 F.2d 788, 795 (7th Cir. 1964) (court found notice of intent to investigate tariffs to determine whether discrimination existed to be adequate for final investigation of the lawfulness of the particular parties' rates).

In sum, when it issued the NPRM, the Commission gave the public broad notice that it was opening the current docket in order to investigate options to "encourage . . . competition in the provision of directory assistance." Telegate proposed just such an option. The Commission is therefore entitled to consider it.

In addition, since all the former BOCs, GTE, WorldCom, USTA, and others, including a rural ILEC have all commented on Telegate's proposal, there is little doubt that, should 411 presubscription be implemented, it will be the product of a full and fair comment period as well as rigorous consideration and examination by the Commission.

VIII. Conclusion

The record of this proceeding amply demonstrates that 411 presubscription will serve the public interest by bringing the benefits of competition to this growing market. The Commission should not allow the self-serving arguments of entrenched monopolists to dissuade it from opening the DA market to true competition. Accordingly, Telegate respectfully requests that the Commission promptly order 411 presubscription as Telegate has proposed in this proceeding.

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[87] *See id.*